

Before the Building Practitioners Board

	BPB Complaint No. CB25287
Licensed Building Practitioner:	James Herridge (the Respondent)
Licence Number:	BP 128514
Licence(s) Held:	Site AOP 2

Decision of the Board in Respect of the Conduct of a Licensed Building Practitioner Under section 315 of the Building Act 2004

Complaint or Board Inquiry	Complaint
Hearing Type:	On the Papers
Draft Decision Date:	2 June 2020
Final Decision Date:	15 July 2020

Board Members Present:

Chris Preston, Chair (Presiding)
Mel Orange, Deputy Chair, Legal Member
Robin Dunlop, Retired Professional Engineer
Bob Monteith, LBP, Carpentry and Site AOP 2
Faye Pearson-Green, LBP, Design AOP 2

Procedure:

The matter was considered by the Building Practitioners Board (the Board) under the provisions of Part 4 of the Building Act 2004 (the Act), the Building Practitioners (Complaints and Disciplinary Procedures) Regulations 2008 (the Complaints Regulations) and the Board's Complaints and Inquiry Procedures.

Board Decision:

The Respondent **has** committed a disciplinary offence under section 317(1)(db) of the Act.

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Introduction

- [1] On 2 June 2020 the Board received a Registrar’s Report in respect of a complaint about the conduct of the Respondent.
- [2] Under regulation 10 of the Complaints Regulations the Board must, on receipt of the Registrar’s Report, decide whether to proceed no further with the complaint because regulation 9 of the Complaints Regulations applies.
- [3] Having received the report, the Board decided that regulation 9 applied to aspects of the complaint but not to the allegation that the Respondent had held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act).
- [4] Under regulation 10 the Board is required to hold a hearing in respect of that matter.

Regulation 9 Decisions

- [5] The complaint to the Board also contained allegations that the Respondent had carried out (other than as an owner-builder) or supervised restricted building work or building inspection work of a type that he or she is not licensed to carry out or
- [6] With regard to that allegation, the Board decided that regulation 9(a) of the Complaints Regulations applied. It provides:

Complaint not warranting further investigation

A complaint does not warrant further investigation if—

(a) *it does not come within the grounds for discipline;*

- [7] The Board made this decision on the basis that there was no evidence that the Respondent had carried out or supervised any restricted building work. The work that was carried out was preparatory to restricted building work being completed but was not itself restricted.
- [8] There was, however, evidence that the Respondent may have held himself out to be as being licensed. As such, the Board considered the charge under section 317(1)(db) to be the more appropriate matter to consider.

Decision Process

- [9] The Board's jurisdiction is that of an inquiry. Complaints are not prosecuted before the Board. Rather, it is for the Board to carry out any further investigation that it considers is necessary prior to it making a decision. In this respect, the Act provides that the Board may regulate its own procedures¹. It has what is described as a summary jurisdiction in that the Board has a degree of flexibility in how it deals with matters; it retains an inherent jurisdiction beyond that set out in the enabling legislation². As such, it may depart from its normal procedures if it considers doing so would achieve the purposes of the Act, and it is not contrary to the interests of natural justice to do so.
- [10] In this instance, the Board has decided that a formal hearing is not necessary. The Board considers that there is sufficient evidence before it to allow it to make a decision on the papers.
- [11] The Board does, however, note that there may be further evidence in the possession of persons involved in the matter or that the Board may not have interpreted the evidence correctly. To that end, this decision is a draft Board decision. The Complainant and the Respondent will be provided with an opportunity to comment on the Board's draft findings and to present further evidence prior to the Board making a final decision. If the Board directs or the Respondent requests an in-person hearing, then one will be scheduled.

Disciplinary Offences Under Consideration

- [12] On the basis of the Registrar's Report the Respondent's conduct that the Board resolved to investigate was that the Respondent had held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act).

¹ Clause 27 of Schedule 3

² *Castles v Standards Committee No.* [2013] NZHC 2289, *Orlov v National Standards Committee 1* [2013] NZHC 1955

Evidence

- [13] The Board must be satisfied on the balance of probabilities that the disciplinary offences alleged have been committed³. Under section 322 of the Act the Board has relaxed rules of evidence which allow it to receive evidence that may not be admissible in a court of law.
- [14] The Respondent was contracted, by way of his business Living Space Construction Limited, to carry out repair work on an existing dwelling under a building consent. The proposed work included framing and recladding and was, as such, restricted building work which could only be carried out or supervised by a person with the appropriate building practitioner licence.
- [15] The Complainant alleged that the Respondent held himself out as being licensed to carry out or supervise the restricted building work. The Respondent was noted in the building consent application as holding a carpentry licence. There was no evidence that he made the application or that he put himself forward as the holder of a carpentry licence. However, he did not note or correct the error or put forward anyone within his business who would be the licensed carpenter⁴.
- [16] The evidence before the Board was that the application for a building consent was made under the direction of *[Omitted]* a licensed carpenter *[Omitted]*. The Complainant alleged that the Respondent instructed *[Omitted]* with regard to the application. *[Omitted]* provided a statement to the effect that the Respondent, whom he had known for some years, had told him that he was a licensed carpenter.
- [17] The Complainant raised the licensing concerns with the Respondent. The Respondent did not respond to the query and the Complainant proceeded to terminate the contract. A commercial dispute has ensued.
- [18] The Respondent was served with the complaint and acknowledged receipt of it. He did not, however, provide any form of response to the allegations.
- [19] The Board was provided with the Respondent's licensing details and history. It confirmed that he is not and has never been licensed in Carpentry. The only class of licence that he has held is a Site Licence.

Conclusion and Reasoning

- [20] The Board has decided that the Respondent **has** held himself or herself out as being licensed to carry out or supervise building work or building inspection work of a type that, at that time, he or she was not licensed to carry out or supervise (s 317(1)(db) of the Act) and **should** be disciplined

³ *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1

⁴ There is a requirement in section 45(1)(e) of the Act that in the case of an application for a building consent that relates to restricted building work, to state the name of each licensed building practitioner who, as far as the applicant is aware at the time the application is made, will be involved in carrying out or supervising the restricted building work that is the subject of the application

- [21] The Board’s consideration of the charge under 317(1)(db) came about as a result of the complaint documentation indicating that the Respondent held himself out as being a licensed building practitioner who could carry out or supervise restricted building work of a type that he was not licensed to carry out or supervise.
- [22] The intended building work included restricted building work in that it was to be carried out under a building consent and it involved structural and weathertightness elements⁵. Under section 84 of the Act:

All restricted building work must be carried out or supervised by a licensed building practitioner [who is licensed] to carry out or supervise the work.

- [23] The Respondent is a licensed building practitioner with a Site Licence.
- [24] The licensing classes designated under section 285 were created by Order in Council in the Building (Designation of Building Work Licensing Classes) Order 2010. It designates the types of building work that a licensed building practitioner can carry out or supervise. Under clause 4 of the Order a Site Licence is designated as a General Class of Licence. This compares to Carpentry which is a Trade Licensing Class. The following is the comparative provisions for each:

Licensing class	Type of building work
<i>General Licence Classes</i>	
<i>Site</i>	<i>Co-ordination or oversight of some or all of the construction or alteration of any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>
<i>Trade Licensing Classes</i>	
<i>Carpentry</i>	<i>Carpentry for any building that is— (a) a category 1 building; or (b) a category 2 building; or (c) a category 3 building</i>

- [25] On the basis of the above, a licensed building practitioner with a Site Licence cannot carry out or supervise restricted building work that is the construction or alteration of the primary structure of a house or a small-to-medium apartment building or the external moisture-management system of a house or a small-to-medium apartment building. Their role is limited to that of co-ordination and oversight. It does not extend to supervision as supervise is a defined term in the Act⁶.

⁵ Clause 5 of the Building (Definition of Restricted Building Work) Order 2011 (New Zealand) defines what is restricted building work. The work described in the complaint came within one or more of those definitions.

⁶ The terms is defined in section 7 of the Act.

- [26] As the Board had uncontested evidence before it that the Respondent was holding himself out as being licensed in Carpentry when he was not the Board has decided that he has committed the disciplinary offence.
- [27] It is important to note that the Respondent has been given notice of the allegations made about him and the opportunity to deny them but that he has not done so.

Decision on Penalty, Costs and Publication

- [28] Having found that one or more of the grounds in section 317 applies the Board must, under section 318 of the Actⁱ, consider the appropriate disciplinary penalty, whether the Respondent should be ordered to pay any costs and whether the decision should be published.
- [29] The matter was dealt with on the papers. Included was information relevant to penalty, costs and publication, and the Board has decided to make indicative orders and give the Respondent an opportunity to provide further evidence or submissions relevant to the indicative orders.

Penalty

- [30] The purpose of professional discipline is to uphold the integrity of the profession; the focus is not punishment, but the enforcement of a high standard of propriety and professional conduct. The Board does note, however, that the High Court in *Patel v Complaints Assessment Committee*⁷ commented on the role of "punishment" in giving penalty orders stating that punitive orders are, at times, necessary to provide a deterrent and to uphold professional standards. The Court noted:

[28] I therefore propose to proceed on the basis that, although the protection of the public is a very important consideration, nevertheless the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty to be imposed.

- [31] The Board also notes that in *Lochhead v Ministry of Business Innovation and Employment*⁸ the Court noted that whilst the statutory principles of sentencing set out in the Sentencing Act 2002 do not apply to the Building Act they have the advantage of simplicity and transparency. The Court recommended adopting a starting point for a penalty based on the seriousness of the disciplinary offending prior to considering any aggravating and/or mitigating factors.
- [32] The offending is serious. The licensing regime is based on the competency of licensed persons being objectively and independently verified. This, in turn, gives confidence to the public that the persons they are engaging are competent to carry the building work. With regard to restricted building work, this is especially important as restricted building work involves those elements of the build which carry the greatest risk if they are not done correctly.

⁷ HC Auckland CIV-2007-404-1818, 13 August 2007 at p 27

⁸ 3 November 2016, CIV-2016-070-000492, [2016] NZDC 21288

- [33] The manner in which a licensed person responds to a disciplinary complaint and conducts their defence can also be taken into consideration by the Board. In *Daniels v Complaints Committee*⁹ the High Court held that it was permissible to take into account as an adverse factor when determining penalty that the practitioner had responded to the complaints and discipline process in a belligerent way. Whilst the Respondent has not been belligerent, he has not engaged in the disciplinary process.
- [34] Based on the above, the Board's penalty decision is that the Respondent be censured and fined \$2,500. The Board considered a censure was required, in addition to a fine, to serve as a reminder that licensed persons need to work within their licence class and thereby within their competency.

Costs

- [35] Under section 318(4) the Board may require the Respondent "to pay the costs and expenses of, and incidental to, the inquiry by the Board."
- [36] The Respondent should note that the High Court has held that 50% of total reasonable costs should be taken as a starting point in disciplinary proceedings and that the percentage can then be adjusted up or down having regard to the particular circumstances of each case¹⁰.
- [37] In *Collie v Nursing Council of New Zealand*¹¹ where the order for costs in the tribunal was 50% of actual costs and expenses the High Court noted that:
- But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*
- [38] The Board notes the matter was dealt with on the papers. There has, however, been costs incurred investigating the matter, producing the Registrar's Report and in the Board making its decision. The costs have been less than those that would have been incurred had a full hearing been held. As such the Board will order that costs of \$1,000 be paid by the Respondent. The Board considers that this is a reasonable sum for the Respondent to pay toward the costs and expenses of, and incidental to, the inquiry by the Board.

Publication

- [39] As a consequence of its decision, the Respondent's name and the disciplinary outcomes will be recorded in the public register maintained as part of the Licensed Building Practitioners' scheme as is required by the Act¹². The Board is also able, under section 318(5) of the Act, to order publication over and above the public register:

⁹ [2011] 3 NZLR 850.

¹⁰ *Cooray v The Preliminary Proceedings Committee* HC, Wellington, AP23/94, 14 September 1995, *Macdonald v Professional Conduct Committee*, HC, Auckland, CIV 2009-404-1516, 10 July 2009, *Owen v Wynyard* HC, Auckland, CIV-2009-404-005245, 25 February 2010.

¹¹ [2001] NZAR 74

¹² Refer sections 298, 299 and 301 of the Act

In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit.

- [40] As a general principle such further public notification may be required where the Board perceives a need for the public and/or the profession to know of the findings of a disciplinary hearing. This is in addition to the Respondent being named in this decision.
- [41] Within New Zealand, there is a principle of open justice and open reporting which is enshrined in the Bill of Rights Act 1990¹³. The Criminal Procedure Act 2011 sets out grounds for suppression within the criminal jurisdiction¹⁴. Within the disciplinary hearing jurisdiction, the courts have stated that the provisions in the Criminal Procedure Act do not apply but can be instructive¹⁵. The High Court provided guidance as to the types of factors to be taken into consideration in *N v Professional Conduct Committee of Medical Council*¹⁶.
- [42] The courts have also stated that an adverse finding in a disciplinary case usually requires that the name of the practitioner be published in the public interest¹⁷. It is, however, common practice in disciplinary proceedings to protect the names of other persons involved as naming them does not assist the public interest.
- [43] Based on the above, the Board will not order further publication.

Section 318 Order

- [44] For the reasons set out above, the Board directs that:

Penalty: Pursuant to section 318(1)(d) of the Building Act 2004, the Respondent is censured.

Pursuant to section 318(1)(f) of the Building Act 2004, the Respondent is ordered to pay a fine of \$2,500.

Costs: Pursuant to section 318(4) of the Act, the Respondent is ordered to pay costs of \$1,000 (GST included) towards the costs of, and incidental to, the inquiry of the Board.

Publication: The Registrar shall record the Board's action in the Register of Licensed Building Practitioners in accordance with section 301(1)(iii) of the Act.

In terms of section 318(5) of the Act, there will not be action taken to publicly notify the Board's action, except for the note in the Register and the Respondent being named in this decision.

¹³ Section 14 of the Act

¹⁴ Refer sections 200 and 202 of the Criminal Procedure Act

¹⁵ *N v Professional Conduct Committee of Medical Council* [2014] NZAR 350

¹⁶ *ibid*

¹⁷ *Kewene v Professional Conduct Committee of the Dental Council* [2013] NZAR 1055

- [45] The Respondent should note that the Board may, under section 319 of the Act, suspend or cancel a licensed building practitioner's licence if fines or costs imposed as a result of disciplinary action are not paid.

Submissions on Draft Decision

- [46] The Board invites the Respondent and the Complainant to:
- (a) provide further evidence for the Board to consider; and/or
 - (b) make written submissions on the Board's findings. Submissions may be on the substantive findings and/or on the findings on penalty, costs and publication.
- [47] Submissions and/or further evidence must be filed with the Board by no later than the close of business on **14 July 2020**.
- [48] If submissions are received, then the Board will meet and consider those submissions.
- [49] The Board may, on receipt of any of the material received, give notice that an in-person hearing is required prior to it making a final decision. Alternatively, the Board may proceed to make a final decision which will be issued in writing.
- [50] If no submissions or further evidence is received within the time frame specified, then this decision will become final.

Request for In-Person Hearing

- [51] If the Respondent, having received and considered the Board's Draft Decision, considers that an in-person hearing is required then one will be scheduled, and a notice of hearing will be issued.
- [52] A request for an in-person hearing must be made in writing to the Board Officer no later than the close of business on **14 July 2020**.

Right of Appeal

- [53] The right to appeal Board decisions is provided for in section 330(2) of the Actⁱⁱ.

Signed and dated this 23rd day of June 2020



Chris Preston
Presiding Member

This decision and the order herein were made final on 15 July 2020 on the basis that no further submissions were received.

Signed and dated this 15th day of July 2020


Chris Preston
Presiding Member

ⁱ Section 318 of the Act

- (1) *In any case to which section 317 applies, the Board may*
- (a) *do both of the following things:*
 - (i) *cancel the person's licensing, and direct the Registrar to remove the person's name from the register; and*
 - (ii) *order that the person may not apply to be relicensed before the expiry of a specified period:*
 - (b) *suspend the person's licensing for a period of no more than 12 months or until the person meets specified conditions relating to the licensing (but, in any case, not for a period of more than 12 months) and direct the Registrar to record the suspension in the register:*
 - (c) *restrict the type of building work or building inspection work that the person may carry out or supervise under the person's licensing class or classes and direct the Registrar to record the restriction in the register:*
 - (d) *order that the person be censured:*
 - (e) *order that the person undertake training specified in the order:*
 - (f) *order that the person pay a fine not exceeding \$10,000.*
- (2) *The Board may take only one type of action in subsection 1(a) to (d) in relation to a case, except that it may impose a fine under subsection (1)(f) in addition to taking the action under subsection (1)(b) or (d).*
- (3) *No fine may be imposed under subsection (1)(f) in relation to an act or omission that constitutes an offence for which the person has been convicted by a court.*
- (4) *In any case to which section 317 applies, the Board may order that the person must pay the costs and expenses of, and incidental to, the inquiry by the Board.*
- (5) *In addition to requiring the Registrar to notify in the register an action taken by the Board under this section, the Board may publicly notify the action in any other way it thinks fit."*

ⁱⁱ Section 330 Right of appeal

- (2) *A person may appeal to a District Court against any decision of the Board—*
- (b) *to take any action referred to in section 318.*

Section 331 Time in which appeal must be brought

An appeal must be lodged—

- (a) *within 20 working days after notice of the decision or action is communicated to the appellant; or*
- (b) *within any further time that the appeal authority allows on application made before or after the period expires.*

